

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

PATRICIA A. COLBURN,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
DE-0752-98-0086-I-1

DATE: NOV 13 1998

Barrie M. Shapiro, Esquire, Minahan & Shapiro, P.C., Lakewood, Colorado,
for the appellant.

Susan Engelman Gibson, Esquire, Arlington, Virginia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision, issued January 26, 1998, that dismissed her appeal for lack of jurisdiction. For the reasons set forth below, the Board GRANTS the appellant's petition, VACATES the initial decision, and REMANDS the appeal for further adjudication.

BACKGROUND

¶2 The appellant filed a petition for appeal alleging that the agency constructively removed her by creating a hostile work environment and retaliating against her for filing an equal employment opportunity (EEO) complaint, thereby causing her to

leave her position and obtain employment at another agency. Appeal File, Tabs 1, 3. The agency moved that the appeal be dismissed for lack of jurisdiction because, among other reasons, the appellant left the agency for a position at another agency at the same grade and pay, and, therefore, did not suffer an appealable action, even if her decision to leave the agency was involuntary. Appeal File, Tab 4.

¶3 Upon considering the parties' submissions in response to several jurisdictional show-cause orders, the administrative judge dismissed the appeal for lack of jurisdiction, finding as follows: (1) A lateral transfer from one agency to another is not an adverse action within the Board's jurisdiction under 5 U.S.C. § 7512; (2) because a lateral transfer between agency is not an appealable matter, a claim that the transfer was involuntary is also beyond the Board's jurisdiction; (3) although the appellant's form SF-50 states that the nature of her leaving the agency was a "termination" it merely reflected that the agency had separated the appellant from its rolls because she transferred to another agency, and did not represent an actual adverse removal; (4) the Board's decision in *Yaksich v. Department of the Air Force*, 71 M.S.P.R. 355 (1996), does not require a finding that the Board has jurisdiction over this appeal because it does not state that the personnel action at issue was a lateral transfer; (5) the appellant's allegations of sexual harassment and the agency's creation of a hostile work environment do not provide an independent source of Board jurisdiction; and (6) because the appellant did not raise a nonfrivolous allegation of jurisdiction, she was not entitled to the hearing she sought.

¶4 In her petition for review the appellant argues that the Board has jurisdiction over involuntary lateral transfers between agencies under *Yaksich*. We agree.

ANALYSIS

¶5 In *Yaksich*, the Board found that an employee-initiated action, such as a transfer between agencies, is presumed to be voluntary unless the appellant

presents sufficient evidence to establish that the action was obtained through duress or coercion, or was otherwise involuntary, and that an appellant is entitled to a hearing on the issue of Board jurisdiction over an appeal of an allegedly involuntary action if she makes a nonfrivolous allegation casting doubt on the presumption of voluntariness. 71 M.S.P.R. at 360. Although *Yaksich* does not specifically state the relationship between the grades of the position the appellant left at her former agency and the position into which she transferred at the new agency, its holding is not limited to transfers to lower-graded positions, and instead finds that “a transfer between agencies” can be appealable if it is involuntary. *Id.* This holding applies to the appellant’s circumstances here.

¶6 In reaching this conclusion, we note that a coerced inter-agency transfer, even a lateral transfer, is analogous to a coerced resignation and is, therefore, within the Board’s jurisdiction. Both actions sever the employment relationship between the parties, and to hold otherwise would preclude review of agency attempts to coerce an employee’s resignation merely because the employee finds a position at another agency. We, therefore, find that if an agency coerces a transfer, the coercion renders it involuntary, and for that reason the transfer is appealable to the Board as tantamount to a removal. *See Ball v. Department of Veterans Affairs*, 68 M.S.P.R. 482, 484 (1995). *See also Koop v. Federal Emergency Management Agency*, 16 M.S.P.R. 605, 607 (1983) (involuntary inter-agency transfer is of no effect and operates to give effect to underlying reduction-in-force action, while a voluntary transfer does not).*

¶7 Here, the appellant has alleged that the agency coerced her into obtaining employment at another agency by creating a hostile work environment and retaliating against her for filing an EEO complaint. Appeal File, Tabs 3, 8, 10.

* In contrast, a coerced intra-agency reassignment, without a reduction in pay or grade, is not an appealable action because a reassignment, even if involuntary, is not an adverse action. *See Talley v. Department of the Army*, 50 M.S.P.R. 261, 262-63 (1991).

Moreover, the appellant has presented specific examples of the agency's alleged improper actions. Appeal File, Tab 3. We, therefore, find that the appellant is entitled to a hearing on the issue of whether her transfer was coerced and, therefore, involuntary. *See Yaksich*, 71 M.S.P.R. at 364-65.

ORDER

¶8 Accordingly, we REMAND this appeal to the Denver Field Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.